STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2003
v	No. 238210 Wayne Circuit Court
JASUBHAI K. DESAI, Defendant-Appellant.	LC No. 95-007158-01

Before: Markey, P.J, and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder, MCL 750.316, for the 1983 strangling death of his business partner, Ann Marie Turetzky. We affirm.

Defendant first argues that his Sixth Amendment right to confront the witnesses against him was violated when the trial court admitted a hearsay confession of his codefendant, Stephen Adams, that implicated defendant. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). The trial court's decisions on constitutional issues and questions of law, including interpretation of evidentiary rules, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The prosecution witness, Lawrence Gorski, a friend of Adams since the mid-1960's and former employee at defendant's Trenton medical clinic, testified that he spoke with Adams in a restroom at a nightclub one evening at which time Adams told him that Turetzky was dead and that he had killed her at defendant's request. Adams proceeded to describe to Gorski significant details about the murder, including that defendant had arranged for Turetzky to meet him at the hotel where Adams strangled her to death. Adams also admitted that he did it for the money and that defendant had indicated to him that he would possibly get him a medical license so that he could practice as a doctor. On appeal, defendant argues that the testimony was inadmissible as a "statement against penal interest" under MRE 804(b)(3), and that the statements did not bear sufficient indicia of reliability to satisfy the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20.

MRE 802 prohibits the admission of hearsay statements as substantive evidence unless an exception applies to the statements. One exception is MRE 804(b)(3) which provides that, when

a declarant is unavailable as a witness, a statement against interest is not excluded by the hearsay rule. In particular, MRE 804(b)(3) provides, in pertinent part:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Under MRE 804(b)(3), the portions of Adams' statements to Gorski that implicate himself in the murder were against Adams' penal interest, and tended to subject him to criminal liability such that a reasonable person in Adams' position would not have said what he said to Gorski unless true and, thus, were admissible. Defendant claims, however, that the "carry-over" portion of the statements—those that implicate defendant in the murder—should not have been admitted into evidence under MRE 804(b)(3).

Defendant relies on and urges this Court to adopt the federal court's interpretation of its analogous court rule, FRE 804(b)(3), which only permits the admission into evidence those remarks that are individually self-inculpatory, and no other. See *Williamson v United States*, 512 US 594, 600-601; 114 S Ct 2431; 129 L Ed 2d 476 (1994). However, our Supreme Court in *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), considered and rejected that interpretation, holding: "where, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)."

Contrary to defendant's urging, the *Poole* holding is neither "obsolete" nor superceded by *Williamson, supra*. There is a critical and dispositive distinction between the *Poole* and *Williamson* cases which is that in *Williamson* the disputed hearsay statements were made by the declarant during a custodial confession incident to arrest. Specifically, in *Williamson*, the declarant codefendant, Reginald Harris, had been arrested for possession of cocaine and, while in police custody, made statements that implicated codefendant Fredel Williamson in a plan to distribute the cocaine. *Id*. at 596-597. However, Harris refused to testify at Williamson's trial and the trial court, pursuant to FRE 804(b)(3), permitted the Special Agent from the Drug Enforcement Administration, who had taken Harris' statements, to testify regarding the contents of those statements. *Id*. at 597. The United States Supreme Court disagreed that the hearsay testimony was admissible, holding that FRE 804(b)(3)

> does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. '[T]he ***arrest statements*** of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible

> than ordinary hearsay evidence.' [*Williamson*, *supra* at 600-601 (citations omitted, emphasis supplied).]

The *Williamson* Court continued its analysis by considering the Advisory Committee's Notes to Rule 804(b)(3), including the following section:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, ***made while in custody***, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . **On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying**. . . . [*Williamson*, *supra* at 601-602, quoting the Advisory Committee's Notes to Rule 804(b)(3) (emphasis supplied).]

Accordingly, the *Williamson* Court was presented with the issue whether the admission of testimony, through a government agent, of statements that were elicited by that government agent from a suspect, during a custodial interrogation following arrest of that suspect, was proper under FRE 804(b)(3), i.e., whether the statements were sufficiently secure from the dangers associated with hearsay to be excepted from the rules prohibiting the admission of hearsay. That is not the issue presented in this appeal, nor was it the issue presented in *Poole*, *supra*.

In *Poole*, the issue was "whether a declarant's noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to someone other than a law enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to MRE 804(b)(3)." *Id*. at 153-154. As quoted above, the *Poole* Court answered the question in the affirmative. It is readily apparent that the Court premised its holding on easily discernable distinctions compared to the *Williamson* case, i.e., (1) in *Poole*, the hearsay was admitted through the testimony of an acquaintance – not a government agent, (2) in *Williamson* the hearsay statements were elicited by a government agent – not an acquaintance, and (3) in *Williamson* the hearsay statements were made during a custodial interrogation following arrest of the declarant. The *Poole* Court referenced the Advisory Committee Notes for FRE 804(b)(3) and particularly focused on the Note that stated, as quoted above by the *Williamson* Court, "[o]n the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying [under FRE 804(b)(3)]." The *Poole* Court held, "[t]he instant case presents just the sort of situation spoken of that 'would have no difficulty in qualifying.'" *Poole*, *supra* at 162.

Here, Gorski's testimony regarding Adams' statements about the murder, including defendant's involvement, were admissible under MRE 804(b)(3) as statements against penal interest. Adams' inculpation of defendant (1) was made in the context of a narrative of events, (2) to a childhood friend, (3) while at a bar, (4) at Adams' initiative without any prompting or inquiry and, (5) as a whole, was clearly against Adams' penal interest since he admitted to killing Turetzky by strangling her in a hotel room. Accordingly, this argument is rejected.

We now turn to whether the admission of Gorski's hearsay testimony as substantive evidence against defendant, although admissible under the rules of evidence, violated defendant's Sixth Amendment right of confrontation, US Const, Am VI; Const 1963, art 1, § 20.

The admission of hearsay statements under MRE 804(b)(3) "does not violate the Confrontation Clause if the prosecutor establishes that the declarant is unavailable as a witness and that the statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception." *Beasley*, *supra*, citing *Poole*, *supra* at 163. Here, it is undisputed that Adams was unavailable as a witness since he was a codefendant charged with the same offense as defendant. Further, in *Poole*, *supra* at 163-164, our Supreme Court declined to declare MRE 804(b)(3) a firmly rooted hearsay exception. The *Poole* Court then set forth the framework by which to conduct the reliability analysis:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
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> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
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> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Id*. at 165.]

In this case the trial court correctly determined that the admission of Adams' statements to Gorski as substantive evidence against defendant did not violate the Confrontation Clause considering the circumstances surrounding the making of the statements and the contents of the statements. Adams' statements were (1) voluntary, (2) made to his friend – someone with whom Adams had a long-term relationship and to whom he would likely speak the truth, (3) uttered spontaneously on his own initiative and without prompting or inquiry by Gorski, (4) did not shift the blame to defendant or anyone else but admitted that he murdered Turetzky alone, (5) were not made for any apparent beneficial purpose, and (6) were not motivated by any apparent reason to lie or distort the truth. Further, the record does not contain any other fact or circumstance that would weigh against the reliability of Adams' statement to Gorski. Accordingly, this argument, too, is rejected. In sum, Gorski's hearsay testimony was admissible under MRE 804(b)(3) and

was sufficiently reliable to satisfy the Confrontation Clause; therefore, the trial court properly admitted the testimony.

Next, defendant argues that he was denied his right to present a defense by the trial court's exclusion of "exculpatory" preliminary examination testimony from an unavailable witness. We disagree. The trial court's evidentiary rulings are reviewed for an abuse of discretion. *Schutte*, *supra*.

A criminal defendant has a right under the federal constitution to confront witnesses and to present a defense. *People v Whitfield*, 425 Mich 116, 124-125 n 1; 388 NW2d 206 (1986). However, the right to confront witnesses and to present a defense extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). Accordingly, the right is not absolute but must "be weighed against the need for 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Holguin*, 141 Mich App 268, 271; 367 NW2d 846 (1985), citing *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), and *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Generally, all relevant evidence is admissible; however, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 402, 403.

Here, the trial court denied the admission of the contested testimony after concluding that the record was very confusing, that the court could not follow the testimony, that parts of the record were unintelligible, and that its admission would further confuse the jury. After considerable review of the testimony, we agree with the trial court. Defendant's claims that this testimony would tend to establish that someone else murdered Turetzky and that this testimony would undermine a testifying police officer's credibility are exaggerated. Review of the transcript reveals little, if any, substantive information. The testimony was very confusing, ambiguous, at times contradictory, and extremely difficult to follow. Further, its probative value is minimal at best, establishing little except that one or two vehicles may have been in the parking lot of this public place, a hotel, during the time frame in which Turetzky's vehicle was parked there. Accordingly, the trial court did not abuse its discretion when it precluded its admission under MRE 403 on the ground that its probative value was substantially outweighed by the danger of confusing or misleading the jury.

Next, defendant argues that the Due Process Clause barred the prosecution of this action because there was no reasonable explanation for the eighteen-year delay which prejudiced defendant's rights, including that the police lost critical evidence. We disagree. This Court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). Whether the law of the case doctrine applies is a question of law that is reviewed de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

In the first appeal in this matter, the prosecutor appealed the trial court's grant of this defendant's motion to dismiss on the ground that a twelve-year prearrest delay violated defendant's due process rights because there was a loss of evidence that prejudiced defendant's right to a fair trial. *People v Adams*, 232 Mich App 128, 131-132; 591 NW2d 44 (1998). Defendant had argued that specific missing witnesses and certain missing physical evidence had

prejudiced his right to a fair trial, and the trial court agreed. After discussing the test regarding prearrest delay, i.e., that a defendant must initially demonstrate actual and substantial prejudice to his right to a fair trial before the prosecution is required to persuade the court that the delay was justified, this Court held that defendant had failed to carry his burden. *Id*. at 134-137. The holding was premised on defendant's failure to establish the exculpatory nature of the missing evidence and, thus, his claims of prejudice were too indefinite and speculative. *Id*. at 138-139.

In this appeal, defendant has essentially reiterated his same argument – unavailable witnesses and missing physical evidence, in addition to Gorski's inability to remember the *exact* date that Adams confessed to him, prejudiced his right to a fair trial. Just as in the previous appeal, defendant offers nothing more than unsubstantiated claims of the exculpatory nature of this evidence. Under the law of the case doctrine, questions of law decided by an appellate court will not be decided differently on a subsequent appeal where the facts remain materially the same and the issue was actually decided, either specifically or necessarily. See *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

Defendant argues that the law of the case doctrine does not apply to this issue because the case went to trial and, apparently because he was convicted, "it has become absolutely clear that Dr. Desai suffered substantial unfair prejudice as a result of the delay and loss of evidence." However, defendant has set forth no legal support for his position that a conviction automatically establishes the requisite "actual and substantial prejudice" to the right to a fair trial. Because the controlling facts remain materially the same as those already considered by this Court with regard to the issue whether the prearrest delay was prejudicial, the law of the case doctrine prevents further consideration of this issue. But, even if we considered the merits of defendant's claims, we would conclude that he did not demonstrate that the prearrest delay caused actual and substantial prejudice to his right to a fair trial.

Next, defendant argues that he was wrongly denied a jury instruction that "[t]he loss of relevant evidence raises a rebuttable presumption that the lost evidence would have been adverse to the prosecution." We disagree. This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

The propriety of such an adverse inference instruction was considered in *People v Davis*, 199 Mich App 502; 503 NW2d 457 (1993). There, defendant was convicted of first-degree murder following the death of his wife. On appeal, he argued that the prosecution's failure to produce crime scene photographs, his wife's clothing and shoes, photographs of the first autopsy, and information regarding blood under his wife's fingernails required a reversal of his conviction due to concealment of critical evidence and the failure of the trial court to give an adverse inference instruction. *Id*. at 513-514. This Court disagreed, holding that suppression of evidence requires consideration of whether the evidence was requested, the suppression was deliberate, and whether the defense could have significantly used the evidence. *Id*. at 514. Because the evidence was simply not available, defendant failed to meet his burden of showing that the prosecutor refused to produce the evidence. *Id*. The *Davis* Court further held that an adverse inference jury instruction was not required because "defendant has not demonstrated that the prosecutor acted in bad faith in failing to produce the evidence. . . the evidence simply did not exist or could not be located." *Id*. at 515.

Here, just as in *Davis*, the evidence was not deliberately suppressed by the prosecutor; rather, the evidence simply was not available. Thus, an adverse inference instruction was not appropriate because such instruction would imply to the jury that the prosecutor was hiding or suppressing important evidence, deliberately or in bad faith, that was beneficial to the defense. That is, the instruction would be misleading, would not fairly present the circumstances of the case, and would not be an accurate representation of the lost evidence. Further, defendant has failed to establish that the evidence would have been beneficial to the defense; in fact, it was in large part inculpatory or cumulative. Therefore, the trial court properly denied defendant's request for an adverse inference jury instruction.

Next, defendant argues that the trial court lacked jurisdiction to adjudicate the matter because, under the version of MCL 770.12 in effect at the relevant time, this Court did not have jurisdiction to reverse the trial court's initial decision and remand the matter. We disagree. Whether this Court has jurisdiction to consider an appeal is a question of law that we review de novo. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995).

The Michigan Constitution grants a defendant in a criminal case a right of appeal, but does not provide for an appeal by the prosecution. Const 1963, art 1, § 20. Consequently, whether a prosecutor may appeal is governed by statute. See *People v Cooke*, 419 Mich 420, 425; 355 NW2d 88 (1984). The statute applicable at the time of the disputed appeal was MCL 770.12, which provided, in relevant part:

> (1) An appeal may be taken by and on behalf of the people of this state from a court of record in all criminal cases, in any of the following instances:
>
> * * *
>
> (c) From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy, or from another order of the court relative to admission of evidence or proceedings had or made before the defendant is put in jeopardy.

The issue here is whether defendant's motion to dismiss on grounds of prearrest delay was a "special plea in bar."

In *People v Robinson*, 118 Mich App 220; 324 NW2d 795 (1982), this Court considered the phrase "special plea in bar" and held that it should be interpreted consistent with the federal interpretation of the same phrase as it was used in the Federal Criminal Appeals Act, 18 USC § 3731, before the 1971 amendment to that Act. *Id*. at 223. In *United States v Weller*, 401 US 254; 91 S Ct 602; 28 L Ed 2d 26 (1971), the United States Supreme Court noted that the phrase "special plea in bar" was confusing in application, holding:

> During its debates on the Criminal Appeals Act in 1907, Congress paid relatively little attention to the 'special plea in bar' section of the Act. The clearest statement of its meaning was given by one of the bill's cosponsors, Senator Patterson:

> 'A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case.'
>
> The tenor of this definition accords with traditional usage, for at common law the most usual special plea in bar took the form of confession and avoidance. In criminal cases the most common special pleas in bar presented claims of double jeopardy or pardon and sometimes the statute of limitations.
>
> A characteristic common to all of these definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged and that the acts were a crime. Rather, it claimed that nevertheless he could not be prosecuted for his crime because of some extraneous factor. A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test. [*Id*. at 259-260 (citations omitted).]

We conclude that the prosecutor's appeal from the dismissal was specifically permitted by the plain language of MCL 770.12(1)(c) because the appeal was from a decision sustaining a special plea. Defendant did not deny that he committed the murder and the motion was not premised on grounds related to the substance of the charge or his guilt or innocence. Rather, defendant claimed that the prearrest delay of twelve years—an extraneous factor—prejudiced his right to a fair trial. Although defendant acknowledged in his brief that "to constitute a 'special plea at bar' a defense must meet two criteria—it is unrelated to the factual merits and, if successful, makes prosecution in the future impossible," defendant still argued that the dismissal here was not within the contemplation of the statute. Defendant's argument ignores the plain language and obvious application of the instant facts to the applicable statute. Clearly, the dismissal was unrelated to the factual merits of the case and would have made a future prosecution impossible since the prearrest delay of twelve years could not be rectified. Accordingly, this Court properly exercised jurisdiction over the prosecutor's appeal of the dismissal.

Finally, defendant argues that reversal is required because of the cumulative effect of errors. Because we have rejected defendant's claims of error, this issue is without merit. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad